Filed 6/7/16 P. v. Delgadillo CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANGEL DELGADILLO, Defendant and Appellant.	B262640 (Los Angeles County Super. Ct. No. VA135092)
In re ANGEL DELGADILLO, on Habeas Corpus.	B267008

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Judgment affirmed. Habeas corpus petition denied.

Myra June Sun, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Rene Judkiewicz and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Angel Delgadillo guilty of second-degree robbery (Pen. Code, § 211).[1] On appeal, defendant contends the trial court erred in giving CALCRIM No. 362, the instruction concerning a defendant's false or misleading statements. Defendant has also filed a petition for writ of habeas corpus, which we ordered considered concurrently with this appeal, and as to which we have directed and received an informal response from respondent and a reply from defendant.[2] In his petition, defendant contends his trial counsel was ineffective in failing to object to the giving of CALCRIM No. 362 and failing to request the court give CALCRIM No. 3400, instructing the jury as to his alibi defense. We affirm the judgment and deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 5:10 a.m. on April 29, 2014, Jose Gonzalez was driving in Pico Rivera when a black car that looked "like a police car" pulled behind him. Gonzalez heard someone in the black car say " 'stop' " over a loudspeaker. He pulled over and the black car stopped behind him. Two individuals exited the black car and approached his car on either side. One individual placed a gun against Gonzalez's neck. The other individual stood by the passenger side of the car and said " 'Give me your money.' " Gonzalez took all the money out of his wallet and gave it to the man standing next to him. The man on the passenger side then asked Gonzalez for his wallet and, after looking in it, threw it on the ground. The two individuals left and Gonzalez reported the incident to the police.

On May 7, 2014, Deputies Joseph Bernas and Leticia Reynoso saw a black car resembling a police car in a Wal-Mart parking lot in Pico Rivera. Defendant was present and Deputy Bernas asked him if he had anything illegal in the car. Defendant said " 'No. Go ahead and search it.' " The deputies opened the trunk and saw "what

---

[1] All other statutory references are to the Penal Code unless otherwise stated.

[2] We hereby grant the request in defendant's petition to take judicial notice of the record in this appeal.

appeared to be a handgun" inside a holster and an air horn. Deputy Bernas attempted to "clear the gun" to remove any live rounds inside it and "found out it was a BB gun." The deputy described the air horn as "a loud horn, like a PA horn" which functions as a "loudspeaker." Deputy Bernas asked defendant why he had a BB gun in a holster and defendant said " 'I don't know because I'm stupid.' " Defendant was placed under arrest.

Defendant was charged with second-degree robbery. At trial, defendant's booking slip was submitted into evidence. The document stated that defendant was employed at a Mobil gas station and Deputy Reynoso testified that defendant provided that information when he was booked. Defendant had been given an opportunity to review the booking slip and then signed it. Defendant also testified at trial. He acknowledged that, when he was booked, he told the deputies he "was working with my brother at Mobil[]" and that he signed the booking slip with that information.

The investigating officer Alba Rodriguez testified that she prepared a photo lineup using defendant's booking photo. Gonzalez identified defendant in the photo lineup as the individual who stood on the passenger side of the car when he was robbed. Upon being shown a photo of defendant's car, Gonzalez identified the car as the one involved in the incident.

After getting a positive identification from Gonzalez, Detective Rodriguez spoke to defendant while he was under arrest at the police station. Detective Rodriguez asked defendant where he was on the morning of April 29, 2014. She testified he told her he was at work at the Mobil station and that he worked his shift there from 10:00 p.m. to 7:00 a.m.

The owner of the Mobil station testified at trial in January 2015, that defendant had last worked at his station "a long time ago," in 2008.

At trial, defendant denied that he told Detective Rodriguez he had been at the Mobil station on the morning of April 29, 2014. He claimed he told Detective Rodriguez he had been at the Mobil station the evening of April 28, 2014 helping his brother, and that he (defendant) was working as an intern at C-Ring Gaming Center the

morning of April 29, 2014. Detective Rodriguez testified that defendant never mentioned C-Ring to her.

Two of defendant's co-workers from C-Ring testified. Dominique Manzo testified that the C-Ring shift report showed defendant was present on the morning of April 29, 2014. However, Manzo said that defendant had written down the information on the shift report stating he had been present during that time. Manzo did not have an independent recollection of defendant being at C-Ring on April 29, 2014 at 5:00 a.m. Defendant's colleague, Roland Acosta, testified he worked at C-Ring from midnight to 4:00 a.m. on April 29, 2014 and remembered seeing defendant at C-Ring during that time.

The jury found defendant guilty and he was sentenced to the mid-term of three years in prison. He timely appealed.

On September 23, 2014, defendant filed a petition for writ of habeas corpus claiming his trial attorney provided ineffective assistance of counsel. This court issued an order to show cause why defendant was not entitled to the relief requested.[3]

CONTENTIONS

Defendant contends his trial counsel rendered ineffective assistance by failing to request an alibi instruction. Defendant also contends the trial court erred in giving CALCRIM No. 362 regarding consciousness of guilt and his trial counsel rendered ineffective assistance by failing to object to that instruction.

DISCUSSION

1. *Failure to Request An Alibi Instruction*

Defendant contends he was denied the effective assistance of counsel. Specifically, he asserts that his trial counsel should have requested the court give CALCRIM No. 3400 which informs the jury that "The defendant does not need to prove [he] was elsewhere at the time of the crime. [¶] If you have a reasonable doubt about

---

[3] "Issuance of an OSC . . . indicates the issuing court's *preliminary assessment* that the petitioner would be entitled to relief if his factual allegations are proved." (*People v. Duvall* (1995) 9 Cal.4th 464, 475.)

whether the defendant was present when the crime was committed, you must find [him] not guilty."

When defendant's appellate counsel contacted trial counsel, trial counsel stated "she did not ask for such an instruction" because "she did not think there was a form instruction on alibi . . . . " Defendant contends that his trial counsel's performance fell below an objective standard of reasonableness because she failed to do the requisite legal research on presenting an alibi defense and competent counsel would have requested an alibi instruction.

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.) In evaluating trial counsel's actions, "[a] court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance." (*People v. Dennis* (1998) 17 Cal.4th 468, 541.) "If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" (*Ledesma, supra,* 39 Cal.4th at p. 746.)

Defendant relies on *People v. Ratliff* (1986) 41 Cal.3d 675 and claims that, in that case, "the Supreme Court found error in a refusal to give the [alibi] instruction where the only proof was a prosecution witness who offered 'some support' for an alibi . . . . " Contrary to defendant's claim, the *Ratliff* court did not find prejudicial error in the trial court's refusal to give an alibi instruction. The court first noted that an alibi instruction in that case "was inapposite because defendant never affirmatively presented an alibi defense." (*Id.* at p. 694.) The court further stated that "assum[ing] *arguendo* that [the witness's] testimony afforded some basis for an alibi instruction[,] [t]he refusal of the trial court [] to give such an instruction was harmless error . . . . " (*Ibid.*) (Emphasis added.)

Defendant also cites authority for the proposition that an alibi instruction must be given if it is supported by substantial evidence and the defense requests it. (See *People v. Jennings* (2010) 50 Cal.4th 616, 675.) He argues that, here, the court would have granted a request for an alibi instruction because the evidence supporting his alibi defense was substantial: he and two of his colleagues testified he was at C-Ring at the time of the crime.

We question whether the evidence supporting defendant's alibi was substantial: Manzo could not independently verify that defendant had been at C-Ring at 5:00 a.m. on April 29, 2014, but said that a statement in the shift report, which defendant had written, showed that defendant had been there at that time. In addition, Acosta only testified that he had seen defendant at C-Ring on April 29, 2014 during Acosta's shift which ended at 4:00 a.m. Lastly, the credibility of defendant's alibi was undermined by strong evidence he had lied to the police about his whereabouts during the time of the crime: Detective Rodriguez testified that defendant had said he was working at the Mobil station at the time of the crime. Although defendant denied having told Detective Rodriguez he was employed by Mobil, he acknowledged that he told the police who booked him that he "work[ed] with [his] brother at Mobil[]."

However, even if the evidence was substantial and the court would have been required to give the alibi instruction had counsel requested it, where the jury is given general instructions regarding reasonable doubt and the burden of proof, the failure to give an alibi instruction does not prejudice a defendant. The California Supreme Court addressed this point in *People v. Freeman* (1978) 22 Cal.3d 434 (*Freeman*), and *People v. Alcala* (1992) 4 Cal.4th 742 (*Alcala*).

In *Freeman*, the California Supreme Court concluded that trial courts do not have a sua sponte duty to give CALJIC No. 4.50, the equivalent of CALCRIM No. 3400, when an alibi defense is raised. (*Freeman*, *supra*, 22 Cal.3d at p. 437.) The court noted that, in that case, the jury was instructed on the reasonable doubt standard of proof. (*Id.* at p. 438.) The court concluded "[i]t would have been redundant to have required an additional instruction which directed the jury to acquit if a reasonable doubt existed

regarding defendant's presence during the crime. . . . [N]o juror could possibly be misled by the failure to instruct on the significance of defendant's alibi defense. [Citation.]" (*Ibid*.)

In *Alcala*, the court revisited the issue and again found there was no sua sponte duty to give an alibi instruction. (*Alcala*, *supra*, 4 Cal.4th at pp. 803–804.) The court stated "[f]or the purpose of instructing with respect to an alibi defense, it is sufficient that the jury be instructed generally to consider all the evidence, and to acquit the defendant in the event it entertains a reasonable doubt regarding his or her guilt. [Citation.]" (*Id.* at p. 804) The defendant also argued he was denied effective assistance of counsel by his attorney's failure to request an alibi instruction. (*Ibid*.) The court rejected the contention, holding "[i]n light of our determination that the instructions given adequately apprised the jury of all relevant legal principles, any failure by counsel clearly was not prejudicial." (*Id.* at pp. 804–805.)

Here, the jury was instructed to acquit the defendant in the event it entertained a reasonable doubt regarding his guilt (CALCRIM No. 220). The court also gave an instruction on circumstantial evidence (CALCRIM No. 224) which reminded the jury, "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt." Similarly, CALCRIM No. 315 (Eyewitness Identification) instructed the jury, "The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty." Lastly, the court gave CALCRIM No. 359 (Corpus Delicti) which again instructed the jury, "You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

Although defendant acknowledges that the jury was correctly instructed on the burden of proof, defendant argues that the prosecution's closing argument suggested that defendant bore the burden of proving his alibi. In closing argument, the prosecution said "You got the prosecution version and then you got the defense version.

The version who claim [*sic*] from the defendant who you know is a liar and you know lied about his booking . . . . So People's version and the defense version." Defendant contends that this " 'prosecution version/defense version' framework . . . insinuated that the 'defense version' was lacking because [defendant] could not prove his absence from the scene—his innocence."

There is no reasonable likelihood the jury would have understood the prosecution's closing argument to shift the burden of proof to defendant. The prosecution's argument was a comment on defendant's credibility and the differing evidence presented by each side. It did not suggest that defendant bore the burden of proof to establish his lack of guilt. The trial court's instructions were sufficient to inform the jury that the prosecution bore the burden of establishing defendant's guilt beyond a reasonable doubt and that defendant should be acquitted if the jury harbored a reasonable doubt on the issue of identity. As the jury was adequately instructed on the burden of proof, trial counsel's failure to request an alibi instruction was not prejudicial and he was not deprived of the effective assistance of counsel. (*Freeman*, *supra*, 22 Cal.3d at p. 438; *Alcala*, *supra*, 4 Cal.4th at pp. 804–805.)

The lack of prejudice is underscored by the extensive evidence of defendant's guilt. The victim positively identified defendant in a photographic lineup and identified defendant's car as the vehicle involved in the robbery. Evidence corroborating the victim's identification of defendant as one of the robbers was found in defendant's car, which was discovered in the same city where the crime was committed and which contained a gun and a loudspeaker. Based on the strong evidence of defendant's guilt, there is no reasonable possibility that a more favorable determination would have resulted had an alibi instruction been given. Accordingly, defendant has not established a claim of ineffective assistance of counsel based on the lack of an alibi instruction.

2. *The Giving of the False Statement/Consciousness of Guilt Instruction*

We review claims of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) Defendant contends the trial court erred in giving CALCRIM No. 362 which states: "If the defendant made a false or misleading statement before

this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt."[4]

The instruction is proper where "there exists evidence that defendant prefabricated a story to explain his conduct." (*People v. Williams* (1995) 33 Cal.App.4th 467, 478 [discussing CALJIC No. 2.03, the equivalent of CALCRIM No. 362].) "Deliberately false statements to the police about matters that are within an arrestee's knowledge and materially relate to his or her guilt or innocence have long been considered cogent evidence of a consciousness of guilt, for they suggest there is no honest explanation for incriminating circumstances. [Citation.]" (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1167–1168.) "When testimony is properly admitted from which an inference of a consciousness of guilt may be drawn, the court has a duty to instruct on the proper method to analyze the testimony." (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1104.)

Defendant contends that his statements to the police that he was working at the Mobil station, although false, do not show a consciousness of guilt because his employment status was irrelevant to whether he committed the robbery. Defendant analogizes his case to *People v. Rankin* (1992) 9 Cal.App.4th 430 (*Rankin*). In *Rankin*, the defendant was convicted of being an accessory after the fact to a robbery and of acquiring a credit card that had been taken in the robbery. (*Ibid.*) When defendant was questioned by the police, he said that an individual called "Chilly B." was involved in attempting to use the stolen credit card. (*Id.* at p. 434.) Defendant later told a detective that "Chilly B." was *not* involved, and that he had said so to protect the individual who *had* committed the robbery. (*Ibid.*)

At trial, the *Rankin* court gave CALJIC No. 2.03, the equivalent of CALCRIM No. 362. The Court of Appeal held that the giving of the instruction was error:

---

[4] The Attorney General asserts defendant forfeited any error by failing to object on these grounds below. However, we need not reach this issue as we conclude that defendant's arguments are without merit.

"[Defendant's] false statement . . . does not reflect a consciousness of guilt. It had the same effect as if he falsely told [the police] he ate a chocolate rather than vanilla ice cream cone while at the mall. [¶] More crucially, however, CALJIC No. 2.03 should never be given unless it can be inferred that the defendant made the false statement for the purpose of deflecting suspicion from himself, as opposed to protecting someone else. [Citation.] . . . Only under such circumstances does a false statement indicate a consciousness of the defendant's *own* guilt, thus becoming admissible against *him*." (*Rankin, supra*, 9 Cal.App.4th at p. 436.)

Here, Detective Rodriguez testified that defendant said he was working at the Mobil station the morning of April 29, 2014. Defendant testified that he never told Detective Rodriguez he was working at the Mobil station at that time but only that he was there the evening before. Defendant does not dispute that there was evidence he gave a false statement about working at the Mobil station; however, he argues that the falsehood did not deflect suspicion from himself, as his employment status was irrelevant to the issue of his guilt.

This case is distinguishable from *Rankin*. In *Rankin*, the defendant's falsehood tended to exculpate a third party and did not deflect suspicion from the defendant. Here, according to Detective Rodriguez's testimony, the relevant statement concerned defendant's whereabouts at the time of the crime, and tended to exculpate defendant. It was not, as defendant contends, his employment status alone that was of concern, but his claim to Detective Rodriguez that he was working at the Mobil station *at the time of the crime*. The false statement thus functioned as an alibi for the time the robbery was committed. Accordingly, as there was evidence defendant prefabricated a story to exculpate himself, the court did not err in giving CALCRIM No. 362. Furthermore, as the giving of CALCRIM No. 362 was proper, defendant's counsel did not render ineffective assistance by failing to object to the instruction.

DISPOSITION

We affirm the judgment and deny the petition for writ of habeas corpus.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.